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SUPREME COURT, U.S.

IN THE UNITED STATES SUPREME COURT

SPRING TERM 1981

NO: 80-6508

DURKIN WOODRUFF
Petitioner-Appellant

V.

HARRY L. ALLSBROOK,
Respondent-Appellee

PETITION FOR WRIT OF CERTIORARI TO

THE FOURTH CIRCUIT COURT OF

APPEALS AT

RICHMOND, VIRGINIA

/s/ Durkin Woodruff

Route 1, Box 36

Jackson, North Carolina 27845

IN THE UNITED STATES SUPREME COURT

SPRING TERM 1981

NO:_____

DURKIN WOODRUFF
Petitioner-Appellant

V.

HARRY L. ALLSBROOK
Respondent-Appellee

PETITION FOR WRIT OF CERTIORARI

TO THE FOURTH CIRCUIT COURT

OF APPEALS AT

RICHMOND, VIRGINIA

The petitioner, Durkin Woodruff, respectfully prays that the Court issue a writ of Certiorari to review the judgment of the United States Court Of Appeals for the Fourth Circuit which was rendered on below dates and the affirming of the district court's order.

OPINION'S FROM COURT'S BELOW

1. (Appendix-A) Exhibit (A)
   UNITED STATES DISTRICT COURT
   October 24, 1980

2. (Appendix-B) Exhibit (B)
   UNITED STATES COURT OF APPEALS
   February 20, 1981

3. (Appendix-C) Exhibit (C)
   March 17, 1981

JURISDICTION OF THE COURT

A. The decisions of the United States Court Of Appeals for the Fourth Circuit entered in this cause was in error on both occasions when entered on the 20th, February 1981, and the 17th, March 1981.

B. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1257 (3), and any other appropriate United States Code that is applicable for the filing of this cause and/or rule of the Supreme Court. Rule 19, 20, 21 and 46.

C. This court should also note that this petition for writ of certiorari to the United States Supreme Court has been filed in apt time.

I. ARE CRIMINAL DEFENDANT'S NOT DEPRIVED OF A FAIR TRIAL, AND DENIED DUE PROCESS OF LAW, WHEN BEING REPRESENTED BY AN ATTORNEY, THAT ENTERS A PLEA DEAL ALLEGEDLY WITH THE GOVERNMENT, WHEN THE DEFENSE ATTORNEY HAS FALSELY, RELATED FACTS TO THE CRIMINAL DEFENDANT TO MATTERS SURROUNDING THE PLEA? COULD SUCH PLEA BE ACCEPTED AS HAVING BEEN VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY ENTERED BY DEFENDANT? HAS DEFENDANT NOT BEEN DEPRIVED, DENIED OF COMPETENT, EFFECTIVE ASSISTANCE OF COUNSEL?

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions involved in this matter are the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

ARE CRIMINAL DEFENDANT'S NOT DEPRIVED OF A FAIR TRIAL, AND DENIED DUE PROCESS OF LAW, WHEN BEING REPRESENTED BY AN ATTORNEY, THAT ENTERS A PLEA DEAL ALLEGEDLY WITH THE GOVERNMENT, WHEN THE DEFENSE ATTORNEY HAS FALSELY, RELATED FACTS TO THE CRIMINAL DEFENDANT TO MATTERS SURROUNDING THE PLEA? COULD SUCH PLEA BE ACCEPTED AS HAVING BEEN VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY ENTERED BY DEFENDANT? HAS DEFENDANT NOT BEEN DEPRIVED DENIED OF COMPETENT, EFFECTIVE ASSISTANCE OF COUNSEL?

The Sixth Amendment right to counsel has been made applicable to the states through the Fourteenth Amendment. GIDEON V. WAINWRIGHT, 372 U.S. 335, 9L. Ed. 2d 799, 83 S. Ct. 792 (1963). This Court has held that, "No person may be imprisoned for any offense, absent a knowing and intelligent waiver, unless he was represented by counsel at his trial." ARGENSINGER V. HAMLIN, 407 U.S. 25, 32 L. Ed. 2d 530, 92 S. Ct. 2006 (1972), the North Carolina Supreme Court has stated that, " The right to counsel applies at the taking of a guilty plea." STATE V. DETTER, 298 N.C. 604 (1979) at 619. It is believed that a criminal defendant is denied due process of law, and the right to the assistance of counsel, for his defense, when an attorney wilfully, intentionally and knowingly mistate facts surrounding an alleged plea that has been worked out with the government, especially, when such plea or arrangement has not been fully or accurately related to the criminal defendant. Any such guilty or nolo contendere plea that is entered to cause a conviction under such circumstances cannot be called one that was voluntarily, or freely entered. In the instant case, the attorney had informed petitioner that he'd receive a sentence of twelve (12) to fifteen (15) years for the entrance of his plea.[1] The instant case initially started as a jury trial, after which the defense attorney began talks about the entering of a plea.[2] The court should be made aware that it was the defense attorney that selected the jury for the trial, and was him that asked for a recess of the trial and began talks about a plea.

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1. This contention was raised in the habeas petition, and page's 2,3,4 of the traverse reply. And also page 5 of the objection of the magistrate. Also pages 3-6 of the briefs to the Fourth Circuit.

2. The attorney made remarks to petitioner about, " You dont have a chance, if you go through a jury trial." " They go convict you, it don't look good, they go convict you." " In order to get the DA and the judge to give you a lesser sentence of 12 to 15 years, you'll have to answer all questions, and sign papers."

STATEMENT OF THE FACTS

The petitioner, was brought to trial in the 4th, October 1977, term of criminal sessions court for the County of Forsyth, in a prosecution for Armed Robbery. The petitioner's trial initially began as a jury trial, which however was terminated by the attorney and ended in a plea bargain trial. The petitioner had been promised by the defense attorney who had made statements that he had worked out a deal with the prosecution for the petitioner to receive a sentence of twelve to fifteen years, nevertheless, petitioner was sentenced to a term of natural life. Petitioner was then given an evidentiary hearing in the Superior Court on the issues. The issues were not resolved in state courts. The North Carolina Supreme Court denied relief as well as the district court as well as the United States Court Of Appeals.

The district court accepted the findings and recommendation of the magistrate, and the magistrate adopted the findings of the state court post-conviction hearing. The district court was required to hold it's own evidentiary hearings, as all the facts were not fully or adequately developed at the state court hearing. FOUNTS V. POGUE, 532 F. 2d 1232 (CA 9 1976), 426 U.S. 925, 96 S. Ct. 2635, 49 L. Ed 2d 379 (1977). As was evidenced in the magistrate's recommendation there was a clear showing of dispute.[3] A hearing in federal court would have allowed the court to make it's own findings in regards to the broken plea and misrepresentation of counsel. See, e.g., LEWIS V. HENDERSON, 520 F. 2d 896 (2nd Cir. 1975), cert. den. 423 U.S. 998, 96 S. Ct. 429, 46 L. Ed. 373 (1975). UNITED STATES Ex. Rel. KIRBY V. STURGES, 510 F. 2d 397 (7th. Cir. 1975), cert. den. 421 U.S. 1016, 95 S. Ct. 2424, 44 L. Ed 2d 685 (1975). Whether an evidentiary hearing is required in habeas corpus proceeding is a question of federal law, while erroneous denial of a state post-conviction evidentiary hearing may be relevant to determination of federal question, it is not dispositive. TOLER V. WYRICK, 563 F. 2d 372 (8th. Cir. 1977). It is further understood that federal court must apply federal constitutional law in habeas corpus proceedings, although it may apply that law to reliably found state facts. SANTOS V. LAURIE, 433 F. Supp. 195 (D.C. RI. 1977). The federal courts are not bound by decision of state court on federal constitutional questions. LOCKETT V. BLACKBURN, 571 F. 2d 309 (5th Cir. 1978). In arriving at a decision in the instant case, the court must consider several factors, one; was the plea entered involuntarily upon misguided advice of the defense attorney, two; was the plea entered by believing attorney was relating facts, three; did attorney falsely relate facts to petitioner in exchange for plea and four; did the attorney in his giving false information not deprive and deny petitioner of due process and the sixth amendment right to competent effective assistance of counsel. The magistrate in his recommendation

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3. As the magistrate stated on page 1 and 2 of his recommendation. " At the state post-conviction hearings, petitioner, his sister, his mother, and his former counsel testified. While petitioner testified that he was promised a 15-year sentence, his counsel presented a radically different picture."

stated attorney competent, same cannot be accepted as fact.[4] Considering that petitioner answered all questions as was told to him by the defense attorney, who specifically had told him to deny plea had been made, when same had been discussed. This does not bar relief on the claim because the transcript of plea shows it was entered freely. The Fifth Circuit Court Of Appeals has recently ruled on this particular issue, when it held that, " Defendant's recitals on record at time of entering guilty plea do not foreclose proof at later time that those were themselves involuntary." FLORES V. ESTELLE, 578 F. 2d 80 (5th Cir. 1978). The petitioner was following the advice and guidance of the defense attorney and was not aware that the attorney was playing deceitful acts on him or giving wrong information to induce a plea. See, e.g., EDWARDS V. GARRISON, 529 F. 2d 1374 (4th Cir. 1975). A Plea of guilty induced by promises or made without full understanding of the consequences will not sustain a conviction. CONEY V. WYRICK, 532 F. 2d 94 (8th Cir. 1976). The voluntariness of a counseled plea of guilty depends on whether the attorney's advide was within the range of competency demanded of attorney's in criminal cases. HUFFMAN V. MISSOURI, 527 F. 2d 899 (8th Cir. 1976), cert. den. 429 U.S. 874, 95 S. Ct. 136, 42 L. Ed 2d 114 (1974). A defendant is entitled to effective assistance of counsel in determining how to plead and making his plea. BURCHETT V. CARDWELL, 493 F.2d 492 (9th Cir. 1974), cert. den. 426 U.S. 924, 96 S. Ct. 2634, 49 L. Ed 2d 379 (1977). COLSON V. SMITH, 438 F. 2d 1075 (5th Cir. 1971). It is believed that the petitioner has established and met the burden required to be granted relief.[5] The Fifth Circuit Court Of Appeals has also held that, " If a criminal defendant is represented at trial by an attorney, either appointed or retained who labors under an actual, and not merely a potential, conflict of interest, defendant has been denied effective assistance of counsel as matter of law and, unless he has knowingly and intelligently waived his sixth amendment right to conflict free representation reversal is automatic and no prejudice need be shown." UNITED STATES V. MARTINEZ, 630 F. 2d 361 (5th Cir. 1980). This court has held that, " Eventhough defendant has no substantive right to particular sentence within range authorized by statute, sentencing is critical stage of criminal proceeding at which he is entitled to effective assistance of counsel." GARDNER V. FLORIDA,_____U.S._____, 97 S. Ct. 1197 (1977), it is accepted that pursuant to North Carolina law, life was the maximum that could have been imposed upon conviction, nevertheless, petitioner had been told he'd receive a 12 to 15 year sentence. The petitioner was entitled to a fair trial. ESTEELE V. WILLIAMS,____U.S._____, 96 S. Ct. 1691 (1976), such could not have been received where an attorney misled, misstated,

misguided, and misadvised petitioner on his plea, arrangement or sentence. VOYLES V. WATKINS, 489 F. Supp. 901 (N.D. Miss. 1980). McQUEEN V. SWENSON, 560 F. 2d 959 (8th Cir. 1977). CASTILLO V. ESTELLE, 504 F. 2d 1243 (5th Cir. 1974). Pursuant to the holdings of the Fourth Circuit Court Of Appeals in Marzullo V. Maryland, the petitioner would be entitled to relief. MARZULLO V. MARYLAND, 561 F. 2d 540 (4th Cir. 1977), the petitioner should be granted a new trial. See also, SPRINGER V. COLLINS, 586 F. 2d 329 (4th Cir. 1978) at 332.

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4. The magistrate at page 2 and 3 stated; "Therefore, counsel told petitioner that if he changed his plea the judge might take that fact into consideration in order to give him something less than a life term. The transcript of the plea and the verbatim record of the plea both disclose that petitioner under oath assured the court that no plea promises had been made to him."

5. See attached herewith and marked respectfully as Exhibits (D), which is traverse to district court. Exhibit (E), which is the magistrates recommendation. Exhibit (F), which is the objection to magistrate recommendation. Exhibit (G), which is the brief to the fourth circuit court of appeals. Exhibit (H), which is the petition for rehearing in fourth circuit court of appeals.

REASON FOR THE GRANTING OF THE WRIT

It is believed that justice would be best served with this Court fully Clearifying as to just what extent an attorney is allowed to deprive a criminal defendant of his constitutional rights to mistate and misguide him in his representation to cause the entrance of a plea of guilty or nolo contendere on false information. It is believed that the court should set some formal guideline as to just what standards are actually to be held to come within bounds for an attorney to be considered as having rendered services that were of a nature that were of a level of competence to assure the criminal defendant the constitutional right to competent effective assistance of counsel. And also the Court should make a ruling on Just what is the definition and standards to determine such competence. The Circuit Courts are all in a dissaray as to just standards are used to be determined as competent effective assistance. This Court should also set such stanards as to also apply to these criminal cases that are in the state courts, as each state has it's own standards which as in North Carolina fall short of that required in MARZULLO V. MARYLAND, 561 F. 2d 540 (4th Cir. 1977),which was affirmed by this Court.

Durkin Woodruff

Durkin Woodruff
Route 1, Box 36
Jackson, North Carolina 27845

SWORN TO AND SUBSCRIBED BEFORE ME

THIS THE 9th DAY OF April 1981

George T. Harrell
Notary Public

MY COMMISSION EXPIRES 12-19-1982

EXHIBIT

(A)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

DURKIN WOODRUFF, Petitioner	)	
v.	)	C-80-280-G
HARRY L. ALLSBROOK, et al, Respondents	)	

JUDGMENT

On October 7, 1980, the United States Magistrate's Findings and Recommendation was filed and notice was served on the parties pursuant to 28 U.S.C. § 636. Thereafter, the Court received petitioner's objections to the Magistrate's Findings and Recommendation.

The Court has appropriately reviewed petitioner's objections and finds that they do not change the substance of the Magistrate's rulings which are affirmed.

NOW, THEREFORE, pursuant to the Magistrate's Findings and Recommendation, it is ORDERED AND ADJUDGED that the petition is denied and this action be, and the same hereby is dismissed.

Eugene A. Gordon
United States District Judge

October 24, 1980

A True Copy

Test:

Clerk, U. S. District Court

By:

Deputy Clerk

EXHIBIT (B)

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-8324

Durkin Woodruff,

Appellant,

v.

Harry L. Allsbrook;
Attorney General of the
State of North Carolina,

Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Eugene A. Gordon, District Judge.

Submitted: January 27, 1981 Decided: February 20, 1981

Before WINTER, BUTZNER, and RUSSELL, Circuit Judges.

(Durkin Woodruff, Appellant Pro Se. Barry J. McNeill, Associate Attorney General, for the Appellees.)

EXHIBIT
(B)

PER CURIAM:

A review of the record and the district court's opinion accepting the magistrate's recommendation discloses that an appeal from its order refusing habeas corpus relief pursuant to 28 U.S.C. § 2254 would be without merit. Because the dispositive issues recently have been decided authoritatively, we deny a certificate of probable cause to appeal, dispense with oral argument, and dismiss the appeal on the reasoning of the district court. Woodruff v. Allsbrook, C/A No. C-80-280-G (M.D.N.C., Oct. 24, 1980).

DISMISSED.

EXHIBIT (C)

FILED

MAR 17 1981

WILLIAM K. SLATE, II
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-8324

Durkin Woodruff,

Appellant,

versus

Harry L. Allsbrook;
Attorney General of the
State of North Carolina,

Appellees.

O R D E R

Upon consideration of appellant's pro se petition for rehearing,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Winter for a panel consisting of Judge Winter, Judge Butzner, and Judge Russell.

For the Court,

/s/ William K. Slate, II

CLERK

Received
In This Office

EXHIBIT
D

80-6508

COURT

AUG - 1 1980

CLERK, U. S. DIST. COURT
GREENSBORO, N. C.

FILED
AUG - 1 1980
IN THIS OFFICE
Clerk, U. S. District Court
Greensboro, N. C.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION
CIVIL NO: C-80-280-G

DURKIN WOODRUFF
Petitioner

V.

HARRY L. ALLSBROOK
Respondent

TRAVERSE REPLY TO
RESPONDENT'S ANSWER TO PETITION
AND MOTION TO DISMISS

TO: THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT PRESIDING OVER THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF NORTH CAROLINA--GREENSBORO--DIVISION:

Durkin Woodruff, A State Court Prisoner Housed at the North Carolina Department of Corrections Odom Correctional Institute at Jackson, North Carolina. Brought this cause of action by way of a Petition for Writ of Habeas Corpus.

In Regards to Contention (A), The Attorney was ineffective assistance of Counsel. As He failed to Properly represent Petitioner, also He failed to Perform Proper Investigations on the facts that surronded the case. He did Mislead the Petitionerin the plea arrangement that he had made. Knew That he had made false Claims when he claimed that he had made an arrangement for a plea to a certain Sentence when He stopped the Trial That was in process, with the trial being a Jury trial. He also Knew That he failed to Obtain any sort of Line up for the Petitioner to be Identified along with Others of his make and Build. Knew that He had a solemn duty to go through with a jury trial if the defendant had so desired to do so. Knowing That it was not his duty and or proper conduct of any sort to Mislead Petitioner in Order to achieve a guilty plea, also he knew that he was not to have Threatened defendant with a Larger Sentence because he desired to Utilize his right to a trial by Jury. The Sixth Amendment right to counsel has been made applicable to the States through the Fourtheenth Amendment, GIDEON V. WAINWRIGHT, 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792 (1963). No Person May be inprisoned for any offense, absent a knowing and intelligent waiver, unless he was represented by counsel at his trial. ARGERSINGER V. HAMLIN, 407 U.S. 25, 32 L.Ed. 2d 530, 92 S.Ct. 2006 (1972), The right to Counsel applies at the taking of a guilty plea. STATE V. DETTER, 298 N.C. 604 (1979) at 619. In the Present Case before the Court The Attorney Made remarks of," You don't have a Chance, if You go through a jury trial." It is Clear That to Have an Attorney That is working against a Criminal defendant instead of in his behalf at a Trial is of little avail and

a Criminal defendant would come out better with no attorney and leaving it up to the marcy of the Court to be lienient. It is understood That Plea bargaining,when properly conducted and fairly negoitiated,serves useful purposes for society,prisoner and quality of justice in those cases which must be tried.LASSITER V.TURNER,423 F.2d 897 (4th Cir.1970).Nevertheless, The Attorney knew That for the Plea to be Voluntarily and Understandingly made, Plea of guilty must be solely the product of the accused's informed free will,and guilty plea is not Voluntary and must be stricken if that free will is Overborne by Prosecutor or accused's counsel.EDWARDS V.GARRISON,529 F.2d 1374 (4th Cir.1975).Therefore applying to the instant case Sub Judice The District Court is not free to disregard allegations in a Habeas Corpus Petition simply because they seem unbelievable.STREETS V.WAINWRIGHT,402 F. 2d 87 (5th Cir.1968).The Attorney Promised a Term Of 12 to 15 Years,It is not his duty to Mis-Quote,Mis-State or Mislead a Criminal defendant in a Legal matter. This Petitioner Never did Freely,willfully or intentionally accept a Life Sentence for his Plea because He could have went to trial by jury and have been found Guilty and sentenced to such by the Trial Court,But He Followed the advice of the attorney to enter such plea and get a 12 to 15 year sentence and ended up with Still a Life Sentence which was not the agreed upon plea deal. The Court Can make a Liberal determination and it will see that The Counsel's representation raises questions as to his suffiiciently being competent and effective and did he properly represent defendant in the case. ROOT V.CUNNINGHAM,344 F.2d 1 (4th Cir.1965).Without any doubts it can be seen That the Attorney did not come up to the Standards set by the Court In the case of MARZULLO V.MARYLAND,561 F.2d 540 (4th Cir.1977). This Petitioner is entitled to relief.

In regards to Contention (B), The Petitioner Herein,Had been Threaten with Life Sentences by the Attorney. After having been informed by Petitioner that he did not actually desire to enter a Plea of Guilty, The attorney Stated; <u>They Go Convict You,It don't Look Good,They Go Convict You</u>. reluctantly Petitioner entered a Plea after the attorney had informed him that he would receive a sentence of 12 to 15 years. Life Sentence for the Plea had never been agreed upon. In the Instant case The Attorney that represented Petitioner had never even advised him of his constitutional right to a trial by jury even though the trial had so Started as such.LOCKETT V.HENDERSON,484 F.2d 62 (5th Cir.1973). However, The Plea

Could not be considered Voluntary or intelligently entered,eventhough such was entered by Petitioner due to the fact of the involuntariness.BOYKIN V.ALABAMA, 395 U.S.238,89 S.Ct.1709 (1968).Based on the factors of this case,the Conviction that was obtained by the State was through a Plea that was involuntary. HENDERSON V.MORGAN,426 U.S.637,96 S.Ct.2253 (1976). The U.S.Supreme Court's holding in NORTH CAROLINA V.ALFORD,400 U.S.25,91 S.Ct.160 (1970). Provided, that, "(1) While most pleas of guilty consist of both a waiver of trial and an express admission of guilt,the latter element is not a constitutional requisite to the imposition of criminal Penalty. (2) Where defendant pleads guilty while simultaneously affirming his innocence,plea may be accepted where it represents intelligent conclusion on part of defendant,that his interests require entry of guilty Verdict and where record before the Trial Judge contains strong evidence of actual guilt." However,The Court must realize that this Petitioner had not waived trial by Jury,it was the 'ttorney who had stopped it and entered the plea.Nevertheless,The defense attorney had told defendant that he'd get a sentence of 12 to 15 Years. The defendant did not know the consequences of the Plea.KELSEY V.UNITED STATES,484 F.2d 1198 (3rd Cir.1973). The defendant herein never was read the Plea form and never had the chance to hear same read, as the attorney,was the one filling out the form,after he'd left the bench from talking with the Judge and District Attorney,telling defendant upon his return to the defense table, " In order to get the DA and the Judge to give You a lesser sentence of 12 to 15 years,you'll have to answer all questions, and sign Papers." However,after signning defendant was told to Stand up by the Trial Judge,after the attorney had given the Judge the Plea form,with no questions asked,or there being any conversation defendant was sentenced to Natural Life. This Court Could Not deny the fact that the act was done through a deliberate mis-guidance by the attorney,with his knowing,that the trial Judge and District Attorney had no intentions of keeping the promised 12 to 15 Years.It has long been the law that a Criminal defendant is entitled to a fair trial,but not a perfect one.BROWN V.UNITED STATES,411 U.S.223,36 L.Ed.2d 208,93 S.Ct.1565 (1973).Such cannot be had where the Attorney and the Other Judicial Officials use tacks to obtain a Guilty Plea and then don't stand by the Plea. Although,Petitioner was Given a Hearing Pursuant to N.C.G.S.15A-1401 Et.Seq.,the facts were not properly brought forward to make a determination on the merits of the claims.This Court Should conduct it's own hearing.STREETS V.WAINWRIGHT,402 F.2d 87 (5th Cir.1968), Pleadings should not be scrutinized with such technical nicety that a meritorious claim should be defeated,and even if claim is insufficient in substance,it may be amended to achieve justice.GORDON V.LEEKE,574 F.2d 1147 (4th Cir.1978), The fact is

further made clear and it is fact and If it is apparent to District Court that Pro se Litigant has colorable claim but lacks capacity to present it, District Coubt should appoint Counsel to assist him.GORDON V.LEEKE,Supra; The Trial Judge did not honob the agreed upon plea of 12 to 15 Years. ELKSNIS V.GILLIGAN,256 F.Supp.244 (1966). The Trial Judge and the District Attorney or the Defense Attorney Should be allowed to Play tricks upon a defendant,by the promising Of One Sentence,Knowing No One has Intentionse of honoring such but defendant,then sentencing him to larger sentence.UNITED STATES V.BATTLE,447 F. 2d 950 (5th Cir.1971). The law is clear that a defendant must understand what he is pleading to.HARNED V.HENDERSON,588 F.2d 12 (2nd Cir.1978). The trial Judge in the present case also did not make a specific inquiry of defendant, his counsal,prosecutor as to whether a plea bargain had been discussed or entered. This defendant is entitled to relief.

In regard to Contention (C),Very contrary to the Testimony of Mr.Gary Walker,He made the promises,that Petitioner herein has stated. The Court should also know that the Attorney could not be expected to take the Stand and admit that he made various promises to Petitioner,to obtain a Plea of Guilty. the Transcript of Plea form was filled out by Mr.Walker,and definitely it could not be expected that he'd admit he did wrong. The transcript of plea form used by the State was the same as that used in recent case of STATE V.DICKENS, 299 N.C.76 (1980). The Plea was broken that was promised,Nevertheless,the law is everso clear that it is the right of an accused in a criminal trial to due process is,in essence,the right to a fair opportunity to defend against the State's accusations.CHAMBERS V.MISSISSIPPI,410 U.S.284,93 S.Ct.1038,35 L.Ed 2d 297 (1973).This Defendant did not freely,voluntarily,waive his rights to a jury trial and the plea was not intelligently entered.Whetther State Prisoner waived his constitutional rights was not a question of fact,but an issue of federal law.BREWER V.WILLIAMS,430 U.S.387,51 L.Ed.2d 424,97 S.Ct.1232 (1977), The Petitioner in this cause of action is entitled to relief as he has been denied and deprived of receiving Constitutional Rights that are guaranteed to him.

FINALLY,This Court should make it's own finding of fact to determine if the Plea Bargain was Broken or if there was a Plea Bargain in the Sense. The North Carolina Courts Themselves have set a principle that,When the evidence is insufficient to support a finding of fact,the case must be remanded for a new hearing.STATE V.ROBINSON,248 N.C.282,103 S.E.2d 376 (1958),STATE V. SAULTS,299 N.C.319 (1979) at 324.

WHEREFORE,It is prayed that the Court will enter order granting relief.

This The 29th Day Of July 1980.

Respectfully Submitted,

/s/ Durkin Woodruff

Durkin Woodruff

Route 1,Box 36

Jackson,N.C.27845

CERTIFICATE OF SERVICE

I,DURKIN WOODRUFF,Hereby Certify That I have sent a Copy of this Traverse reply to the Attorney General Of North Carolina by sending it Postage Prepaid to hiss address;

Mr.Rufus Edmisten
N.C.ATTORNEY GENERAL
P.O.Box 629
Ruffin-Justice Bldg.,
Raleigh,N.C.27602

/s/ Durkin Woodruff

SWORN TO AND SUBSCRIBED BEFORE ME

THIS THE 29th DAY OF July 1980

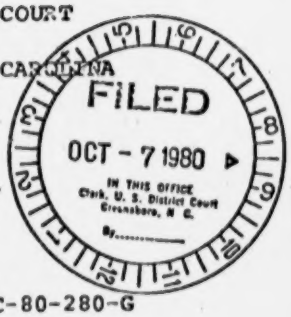
Notary Public

MY COMMISSION EXPIRES 12-19-1982

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION



Durkin Woodruff,	)	
	)	
Petitioner,	)	
	)	
v.	)	C-80-280-G
	)	
Harry L. Allsbrook, et al,	)	
	)	
Respondents.	)	

N O T I C E

Attached to this Notice are Findings and Recommendations in the referenced action. They have been entered on the records of this court pursuant to Local Rule 50, Jurisdiction and Duties of Full-Time United States Magistrates and 28 U.S.C. § 636(b).

Sub-paragraph (C) of the referenced statute provides:

> "(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.
>
> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions."

You are hereby notified that unless written objections to the Findings and Recommendations are filed as provided in the statute, an appropriate order or Judgment will be entered on the Findings and Recommendations.

I hereby certify that on the 7th day of October, 1980, I deposited in the United States mail one true copy of this notice with copy of Magistrate's Findings and Recommendations attached, enclosed in a United States Government franked envelope, addressed to the attorneys listed below at the last known addresses, as follows:

Mr. Durkin Woodruff
Route 1, Box 36
Jackson, N. C. 27845

Mr. Richard N. League(2)
Special Deputy Atty. Gen.
Post Office Box 629
Raleigh, N. C. 27602

Carmon J. Stuart, Clerk

By: Carol Hayes
Deputy Clerk

EXHIBIT (E)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

DURKIN WOODRUFF, Petitioner	)	
v.	)	C-80-280-G
HARRY L. ALLSBROOK, et al, Respondents	)	

MAGISTRATE'S FINDINGS AND RECOMMENDATION

Petitioner challenges the voluntariness of his state court guilty plea pursuant to 28 U.S.C. § 2254. Most of the matters raised here were the subject of a state court post-conviction hearing. [Because the state court determination fully and adequately explored this entire matter, this Court may accept those findings as presumptively correct] 28 U.S.C. § 2254(d), Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

Here, as in the state court, petitioner claims that he is a victim of a broken plea bargain by his attorney. He claims that his attorney promised him that he would only receive a sentence of 12 - 15 years if he pled guilty rather than a sentence of life imprisonment. Petitioner claims he did not want to plead guilty but was threatened by his attorney with receiving a life sentence if he did not. Furthermore, petitioner claims his attorney was ineffective because he failed to present certain evidence which would have shown petitioner's innocence.

At the state post-conviction hearing, petitioner, his sister, his mother, and his former counsel testified. While

petitioner testified that he was promised a 15-year sentence, his counsel presented a radically different picture. Counsel testified to the following facts. [After a jury had been selected, the state put on evidence from the proprietor of the store which had been robbed and also that from an accomplice who was already serving time on the charge. Prior to that time, petitioner had been of the belief that his fellow accomplices would not testify against him. After it became apparent that both accomplices were willing to so testify, counsel called a recess and explored a plea bargain with petitioner. Counsel was of the opinion that petitioner had no defense to the charge and likely would receive a life imprisonment term if he proceeded with the jury trial. He discussed this matter with petitioner. He explained to petitioner that, while no assurances could be made, if petitioner pled guilty he might stand a better chance of receiving less than a life sentence. [Counsel also was reluctant to let petitioner take the witness stand himself because of petitioner's prior record which included a manslaughter conviction.]

Petitioner's counsel could not obtain any plea bargain assurances from either the judge or the district attorney. Petitioner was informed of this fact. Petitioner was specifically told that there would be no guarantee of his receiving a 15-year sentence such as the one received by one of petitioner's accomplices. (The other accomplice received a 40- to 60-year sentence.)] Therefore, counsel told petitioner

that if he changed his plea the judge might take that fact into consideration in order to give him something less than a life term. The transcript of the plea and the verbatim record of the plea both disclose that petitioner under oath assured the court that no promises had been made to him. The judge reviewed these facts and further noted that petitioner had previously been through the plea bargaining process wherein he had been charged with armed robbery and murder and the charge was reduced to manslaughter. The Court found the credible evidence did not support petitioner's claim.

A review of the record and the state court judge's findings of fact show that no plea bargain had been made to plaintiff and that he voluntarily and intelligently pled guilty. While petitioner's counsel felt that pleading guilty might save petitioner from receiving a life sentence, the fact that it did not does vitiate the guilty plea. The advice an attorney gives his client which is a prediction of the sentence, even though erroneous, does not normally affect an otherwise valid guilty plea. Vanater v. Boles, 377 F.2d 898 (4th Cir. 1967); Seiller v. United States, 544 F.2d 554 (2d Cir. 1975). In this case, pleading guilty did not save petitioner from receiving a life sentence. Nevertheless, it is clear that no promises were made to petitioner, and the attorney's prediction, even though it did not subsequently come true, has no effect on the guilty plea. The advice given by the attorney was reasonable under the circumstances. It is of no consequence that, perhaps as a

result of petitioner's prior record or for some other reason, the court failed to give petitioner less than a life sentence. What he did obtain was a reasonable chance to obtain more lenient treatment, which is all petitioner had a reason to expect.

Petitioner's further contention that he received ineffective assistance of counsel because his attorney failed to present evidence at the trial establishing his innocence is without merit. Therefore, even though petitioner has failed to exhaust his state court remedies in that regard, the contention may be dismissed. In this case, petitioner has not even indicated what evidence should have been presented. In any event, it was petitioner who prevented this course of action from taking place since he aborted his jury trial and elected to plead guilty. As a result, this ground is no longer open to petitioner. Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1601, 36 L.Ed.2d 235 (1973).

IT IS THEREFORE RECOMMENDED that the petition be denied and this action be dismissed.

Russell A. Eliason
United States Magistrate

October 7, 1980

A True Copy
Teste:
Carmon J. Stuart, Clerk
By: Carol Hayes
Deputy Clerk

EXHIBIT (F)

80-6508

copy

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

C-80-280-G

DURKIN WOODRUFF Petitioner V. HARRY L. ALLSBROOK Respondent	PETITIONERS RESPONSE AND OBJECTIONS TO THE MAGISTRATES RECOMMENDATIONS

Durkin Woodruff, a State Court prisoner that is presently confined to the North Carolina Department Of Corrections, Odom Prison Unit at Jackson, North Carolina instituted this action pursuant to 28 U.S.C. 2254. The Petitioner Objects to the magistrates findings and recommendations, because the findings and recommendations are based upon a set of findings held in a State Court that did not in fact show the actual voluntariness of the plea that was entered, or to the extent of pressure that was applied on the defendant to cause him to enter such pleas of which he was convicted and sentenced.

The State Court hearing that was held via a Motion for appropriate relief did not present all the facts that would have in fact shown that the plea was involuntary. The Findings of the State Court in fact failed to show that the State Court Judge had the authority to Vacate the sentence and grant a new trial had he so desired, but for reasons of his own knowledge he failed to do so, nevertheless that does not cure the fact that the defendant did not receive a fair trial in the Court at the Time of the Trial ,and the hearing that was held via way of a motion for appropriate relief. It also does not cure the fact that the attorney that represented the defendant made promises that he was unable to keep or that defendant had been promised a sentence and the sentence was not given. Albeit, this court must realize that this defendant is filing his pleadings to the court Pro Se and don't expect the Court to believe his claims as face value over that of the attorney, that claimed he never made promises. However, It is well understood that allegations

of pro se complaint of prisoner are held to less stringent standings than formal pleadings drafted by lawyers.HOLLAND V.CONNORS,491 F.2d 539 (5th Cir.1974). The defendant was depending on the service of the attorney to properly represent him and did not expect the attorney to mislead,misguide,misquote facts of the plea to him. When The attorney informed defendant that he would get a sentence of Twelve to Fifteen years that was what he was expecting to receive and not a life sentence that he received. It is clear that guilty plea cannot be considered intelligently and voluntary unless it be shown that the accused was aware of the implications and possible consequences of his plea, with its concomitant waiver of fundamental constitutional rights.DULIN V. HENDERSON, 448 F. 2d 1238 (5th Cir.1971), this defendant was not aware of the consequences of the plea, that he was going to get a natural life sentence, and did not just waive his constitutional rights to receive a jury trial and definitely did not waive his rights to receive counsel that was competent and effective and was not out to just make a farce out of his representation of defendant. The fact is clear that the record of State Court proceedings would not support findings that petitioner's guilty plea was intelligently and voluntarily entered.DULIN V.HENDERSON, Supra; the court should take into consideration that the defendant's sister, mother and counsel are not convicted and in prison. Neither did his counsel have to mis-state the facts in order to obtain a plea that he did receive. The defendant's Mother,Sister were present and knew that from a layman's point of view the representation done by Counsel was not adequate and up to the proper standings of a competent attorney. Eventhough, defendant's family members testified in the hearing held, the fact still remains that the attorney did mislead,misstate facts that caused defendant to enter the plea that was entered. The defendant did not in fact understand the full facts of the plea or the consequences in which he was facing. The matter is everso clear that if defendant has not understood nature of charge and consequences of guilty plea, plea is not valid. UNITED STATES V. BRONSON, 449 F. 2d. 302 (10th Cir.1971). Regardless of the evidence that was presented by the State after a jury was selected, that still does not cure this court of jurisdiction to review the State Court's denial for new trial.SAWYER V.HALLAHEY, 510 F.2d1220 (1st Cir. 1975), as the defendant presented his claims to the Court pursuant to North

Carolina General Statutes 15A-1401 Et.Seq., and was challenging the denial of various constitutional rights. Liberal Construction must be accorded Pro Se habeas petitions. HAGGARD V. ALABAMA, 494 F. 2d 1187 (5th Cir.1974). This defendant was depending on the attorney to properly represent defendant, and it was his duty to continue with a jury trial, despite his own personal beliefs of defendant had no defense to the charge and likely would receive a life imprisonment term if he proceeded with the jury trial. It was defendant's constitutional right to havve a jury trial. If defendant would have received a jury trial and been found guilty by the triers of fact (the Jury), he always could have appealed the assignment of errors and would not have lost his rights to appeal with a forfeiture that was in fact a waiver that was involuntary due to a plea that was entered through a plea deal that was involuntary. A right to counsel must find its constitutional basis in either the commands of the sixth amendment or the general guarantee of fundamental due process guaranteed by the fourteenth amendment. FERGUSON V.CATHRIGHT, 485 F.2d 504 (4th Cir.1973), The attorney had a duty to perform to the defendant and he failed to do that expected duty and did cause the defendant to enter a plea that any sensible persons would not have taken, any one that is of sane mind will not just freely and voluntarily accept a plea of guilty to a life sentence,knowing that they'd have to do Twnety Years for Parole and Eight Years for Honor Grade. To even believe that this defendant would just voluntarily do such is outragious.Disloyalty or conflict of interest of attorney may,if substantial and proven,result in denial of effective assistance of counsel in contravention of the sixth amendment. UNITED STATES V. McCORD, 509 F.2d 334 (D.C. Cir.1974). The attorney had a duty to properly investigate and prepare for the trial,and knew that it was defendant's right to testify at his own trial in his own behalf,regardless of his prior record as defendant was not being tried on his prior offense as he had been punished and/or tried for that and was then presently being tried for a different matter. Effective assistance of counsel refers not only to forensic skills but to painstaking investigation in preparation for trial. WOLFS V.HUTTON, 509 F.2d 304 (8th Cir.1975). The defendant was the victim of a broken plea bargain,and is not responsible for the attorney having making a plea in which he was unable to keep,nevertheless the attorney was the one that told defendant about a plea that he got for a

twelve to fifteen years. Very contuxry to the attorney's stating it,he did promise defendant a plea of twelve to fifteen years. The Court should hold a hearing to make it's own determination as to the plea being broken. HILLIARD V.ALABAMA, 494 F.2d 35 (5th Cir.1974). The Transcript of plea in which was signed by the defendant fails to show anything of facts word for word as to exactly what the plea was or the promises made thereto. There is no question that there are some disputes in regards to the matters presented by the defendant andthe attorney andthe State. Where facts are in dispute,federal court in habeas corpus must hold evidentiary hearing if applicant did not receive a full and fair evidentiary hearing in state court,either at the time of trial or in a collateral proceeding,federal evidentiry hearing is required unless state court trier of fact after a full hearing has reliably found relevant facts/ U.S. ex rel KIRBY V.STURGES,510 F. 2d 397 (7th Cir.1975). It is clear that where the material facts with respect to scope of plea bargain were not adequately developed at State Court hearing,claim for habeas corpus relief by state prisoner who was not awarded an evidentiary hearing,based on assorted failure of State to live up to a plea bargain would be remanded for further evidentiary proceedings.SWANSON V.ESTELLE,492 F.2d 115 (5th Cir. 1974). Therefore, it is clear that this court has the jurisdiction to make its own independent finding of facts and make a ruling thereof after hearing is held in the court. If guilty plea was induced by plea bargain that was subsequently broken,petitioner seeking to set aside sentence was entitled to relief.BRYAN V.UNITED STATES, 481 F.2d 272 (5th Cir.1973). Federal Courts are not bound by State decisions in a habeas corpus proceeding.BELL V.ROMBISTO, 501 F. 2d 346 (9th Cir.1974). Federal district court may conduct post conviction evidentiary hearing,if necessary to determine if guilty plea by state defendant was voluntarily and intelligently made. WILKINS V.ERICKSON, 505 F.2d 761 (9th Cir.1974). The United States Court Of Appeals for the Fourth Circuit has held that, Pleadings should not be scrutinized with such technical nicety that a meritorious claim should be defeated,and even if claim is insufficient in substance,it may be amended to achieve justice.GORDON V.LEEKE,574 F.2d 1147 (4th Cir.1978), The fact is clear the attorney's actions have caused defendant to be confined to prison due to the denial of effective

competent assistance of counsel. The attorney's representation did not come up to the standards set by the court in the recent case of, MARZULLO V. MARYLAND, 561 F.2d 540 (4th Cir.1977).North Carolina Court's themselves has stated that, "The rule is well settled in this State that findings of fact made by the trial judge, and conclusions drawn therefrom on the voir dire examination, are binding on the appellate courts if supported by evidence. STATE V. PHILLIPS, 37 N.C. App. 202 (1978) at 204. There is a lack of such a finding having been made by the defendant herein to show that he voluntarily and intelligently entered the plea that was entered or that the defense attorney did not in fact inform defendant of the plea of which he could enter and receive a sentence of not more than Twelve(12) to Fifteen (15) Years. The Court should also note that the defendant has exhausted each and every remedy that is available to exhaust in the State Courts, it is just an error on the part of the magistrate in saying that the attorney was not contention of ineffective assistance of counsel had not been exhausted or presented for exhaustion via way of state courts as this matter was raised to the state courts. Also it was not the defendant that aborted the trial,it was the trial defense attorney that stopped the trial. The fact is clear that State Courts need not have ruled on the merits of an issue before the question can be considered by the federal corpus judiciary in a habeas corpus action. It is enough that the State Courts were presented the Opportunity to rule on the question raised by the petitioner in his federal action. RICE V. WOLFF, 513 F. 2d 1280 (8th Cir.1975). A guilty plea is invalid unless voluntarily given by defendant with a full understanding of the possible consequences of the plea. UNITED STATES V. MAGGIO, 514 F. 2d 80 (5th Cir.1975). The attorney was suppose to have assured that the defendant did in fact understand the plea or not and to make sure that ifthe defendant did not desire the plea that he would continue with the jury trial, instead of stopping it, and having defendant enter a plea which netted him a life sentence when when he had in fact been promised a sentence that was no where near a life sentence. The attorney mis-represented the facts. See,e.g., UNITED STATES V. OWEN, 492 F.2d 1100 (5th Cir.1974), which was in fact trickery played on defendant which showed him to be factually ineffective and no

competent assistance of counsel. Federal habeas petitioner who claims he is detained pursuant to a final judgment of a final judgment of a state court in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits reached by the claim in state court. WAINWRIGHT V. SYKES, 433 U.S. 72, 53 L.Ed. 2d 594, 97 S.Ct. 2497 (1977).

WHEREFORE, It is prayed that the Court will render relief and grant habeas corpus and/or hold an evidentiary hearing in the court on the issues presented.

This The 15th Day Of October 1980.

Respectfully Submitted,

/s/ Durkin Woodruff

DURKIN WOODRUFF
~~Pro Se~~ Route 1, Box 36
Jackson, North Carolina 27845

CERTIFICATE OF SERVICE

I, DURKIN WOODRUFF, Hereby certify that I have mailed a copy of this Document to the North Carolina Attorney General at his address with postage being prepaid.

/s/ Durkin Woodruff

SWORN TO AND SUBSCRIBED BEFORE ME
THIS THE 15th DAY OF Oct. 1980

Grace T. Harrell
NOTARY PUBLIC

MY COMMISSION EXPIRES 12-19-1982

(H)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
CASE NO: 80-6324

DURKIN WOODRUFF
Petitioner

V.

HARRY L. ALLSBROOK
Respondent

PETITION FOR REHEARING
IN FORMA PAUPERIS

TO: THE HONORABLE JUDGES PRESIDING OVER THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT:

COMES NOW, DURKIN WOODRUFF, the petitioner in this cause of action most respectfully presents this petition for rehearing unto the court, and as so ask that the entire court hold oral arguments on his appeal to the court pursuant to the laws set by the United States Codes and rules of this court.

STATEMENT OF THE FACTS

The petitioner in this cause was brought to trial in the 4th, October 1977, term of criminal sessions court of Forsyth County in a prosecution for armed robbery. Petitioner's trial initially began as a jury trial, which was terminated and then ended on the entrance of a guilty plea. The petitioner was then sentenced by the trial court to a term of Natural life. Petitioner had an evidentiary hearing that was held pursuant to N.C.G.S. 15A-1401 Et. Seq., the issues were not resolved in the State Courts and the district court has failed to grant relief and the Fourth Circuit Court Of Appeals has affirmed the dismissal pursuant to the authority of the district court which was in error. The petitioner hereby states that he presents the following points in support of his petition for re-hearing.

1. The question that was presented to the Court on Appeal was; CAN A GUILTY PLEA BE CONSIDERED AS HAVING BEEN ENTERED FREELY, KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY, WHERE SUCH PLEA WAS ENTERED UPON THE ADVICE OF AN ATTORNEY WHO DELIBERATELY AND KNOWINGLY MISSTATED, MISQUOTED, MISGUIDED THE CRIMINAL DEFENDANT INTO THE ENTRANCE OF A GUILTY PLEA WITH HIS HAVING FAILED TO TRUTHFULLY REPRESENT FACTS TO THE CRIMINAL DEFENDANT ON THE CONSEQUENCES AND FACTS OF SUCH PLEA?

The decision of this court in the unpublished opinion filed February 20, 1981, was in error and the court has failed to consider the questions presented in the appeal. It is believed that the court should render an opinion or hold evidentiary hearing or oral arguments to resolve the issues presented in the appeal. The petitioner has presented a claim in which the attorney that was representing him at trial acted unprofessionally in the guidance of a plea to the courts and obtained petitioner a life sentence wherein petitioner had not been informed that he would get such sentence but was promised less.

If the laws of the courts are to have uniform [illegible]

admit that, in reviewing factual determination of state courts, federal district courts grant habeas relief only upon convincing proof of error. THOMPSON V. WAINWRIGHT, 601 F. 2d 768 (5th Cir. 1979). This being facts, then the court must also admit that an attorney should not be allowed to wilfully tell a criminal defendant that he will receive a certain sentence, if he enters a plea and then after such plea has been entered will then scottle after the petitioner has received a much greater sentence than that in which he had been promised. As the record will reveal the magistrate did not address this issue. This Court must also admit that anyone in his rightful sane mind would not accept a plea for life sentence's. The record must also be clearified that the records of state courts will at no place show where petitioner wilfully, and/or voluntarily entered a plea or agreed to accept a life sentence or that he was not acting on the advice of the attorney. Federal Court, in deciding whether there has been violation of federal constitutional rights in state court, may look at whole record, up to time of federal review. BROWN V. CRIST, 492 F. Supp. 965 (D.Kan. 1980).
The petitioner believes that he has the constitutional right to the right of competent effective assistance of counsel to properly guide and represent him in the entrance of plea, or on any legal issues. Eventhough defendant has no substantive right to particular sentence within range authorized by statute, sentencing is critical stage of criminal proceeding at which he is entitled to effective assistance of counsel. GARDNER V. FLORIDA,____U.S.____97 S. Ct. 1197 (1977). It is believed that the attorney's failure to act at the guilt stage of the petitioner's proceedings constituted ineffective assistance of counsel. VOLLIS V. WATKINS, 489 F. Supp. 901 (N.D. Miss. 1980), as the attorney was aware that the life was not the promised sentence in which he had informed petitioner he'd get in order to obtain the plea deal, or plea bargain. The findings of the magistrate in which the district court depended upon and adopted were of an erroneous nature also in that, there is not a factual showing on the record that petitioner actually knew the consequences of the plea and the fact must be further made clear that, ignorance of the consequences of guilty plea is a factor that may require its rejection. LEWELLYN V. WAINWRIGHT, 593 F. 2d 15 (5th Cir 1979).See also WILLETT V. GEORGIA, 600 F. 2d 538 (5th Cir. 1979). There is no mistaken that, if guilty plea is induced by defense counsel's misrepresentation of the prosecutors promises, the plea should be vacated as involuntary. KNIGHT V. UNITED STATES, 611 F. 2d 918 (1st. Cir. 1979), the district court and this court has failed to address this issue that there was some misrepresentation to petitioner to obtain the plea in which was obtained that resulted in the conviction. Requirement that guilty plea be voluntary and intelligent applies to all guilty pleas, not merely those in which a plea bargain has been struck. MANLEY V. UNITED STATES, 588 F. 2d 79 (4th Cir. 1978).

CONCLUSION

The petitioner is of the believing that such acts have not been resolved in this circuit on just to what extent a criminal defendant is ~~aaaa~~ allowed to be mislead or misguided by a criminal defense attorney before such act begans to invade the provinces of rights guaranteed by the Constitution. If the holdings of the Fifth Circuit Court of appeals has any bearing then this court should consider such law in this circuit, that court has held that, "If defendant is mistaken as to terms of plea bargain, his guilty plea must be deemed less than a fully knowledagable waiver of his rights." UNITED STATES V. PRESSLEY, 602 F. 2d 709 (5th Cir. 1979). The Third Circuit Court of Appeals has held that, " Nothing can corrode respect for a rule of law more than the knowledge that the government loks beyond the law itself to arbitrary considerations, such as race, religion, or control over the defendant's rights, as the basis for determining its applicability. UNITED STATES V. BERRIOS, 501 F. 2d 1207, 1209 (2nd Cir. 1974), UNITED STATES V. TORQUATO, 602 F. 2d 564 (3rd Cir. 1979). It is therefore believed that this court ~~show re-hearin~~ should hold re-hearing on the appeal and do so before the entire court for the following reasons also;

(1)- To set a standard in this district or in the states of North Carolina, South Carolina, Virginia, Maryland, and West Virginia, on just just what limits an attorney is allowed to mislead, misguide a criminal defendant in the acceptance of a plea bargain before such plea violates rights guaranteed by the Sixth and Fourteenth Amendments.

(2)- To determine when a plea that is entered cannot be considered one of having been voluntarily and/or intelligently entered upon advice of attorney.

(3)- To determine if a criminal defendant is not denied due process of law, when he enters a plea that has been arranged by the defense attorney, who has knowingly, and wilfully mistated the facts of the sentence that a criminal defendant will receive when he in fact knows that such sentence will not be imposed prior to his having stated same to defendant, should the attorney not be bound by the representation to the cciminal defendant that he'll receive a certain sentence for his entrance of a guilty or nolo contendere plea.

It is believed that the court can resolve the questions with a full hearing and briefing to determine the matter.

IT IS PRAYED THAT THE COURT GRANT RELIEF.

This the 28th Day Of February 1981

Respectfully submitted,

/s/ Durkin Woodruff

Route 1, Box 36

Jackson, N.C. 27845

CERTIFICATE OF SERVICE

I, DURKIN WOODRUFF, hereby certify and state that I have served a copy of this petition upon the attorney general by mailing to him with the postage being prepaid to his address.

/s/ Durkin Woodruff

SWORN TO AND SUBSCRIBED BEFORE ME

THIS THE 28th DAY OF February 1981

George T Harrell
NOTARY PUBLIC

MY COMMISSION EXPIRES 12-19-1982